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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1937

THE UNITED STATES OF AMERICA, *Appellant,* vs. MILO W. BEKINS and REED J. BEKINS, as Trustees Appointed by the Will of Martin Bekins, Deceased, et al., *Appellees.*	No. 757
LINDSAY-STRATHMORE IRRIGATION DISTRICT, *Appellant,* vs. MILO W. BEKINS and REED J. BEKINS, as Trustees Appointed by the Will of Martin Bekins, Deceased, et al., *Appellees.*	No. 772

MOTION AND BRIEF OF WEST COAST LIFE INSURANCE COMPANY AS AMICUS CURIAE.

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Subject Index

Table of Authorities Cited

Cases

Codes and Statutes

In the Supreme Court
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United States

OCTOBER TERM, 1937

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it please the Court:

The undersigned, as counsel for West Coast Life Insurance Company respectfully moves this Honorable Court for leave to file the accompanying brief in this case as Amicus Curiae.

Dated, San Francisco, California,
March 28, 1938.

FRANCIS V. KEESLING,
Counsel for West Coast Life Insurance Company As Amicus Curiae.

CHARLES L. CHILDERS,
Of Counsel.

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BRIEF OF WEST COAST LIFE INSURANCE COMPANY AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

Amicus Curiae, West Coast Life Insurance Company, is an insurance corporation, as its name implies, having its principal place of business in the City of San Francisco.

By Act of the Legislature of California, approved June 13, 1913 (Stats. 1913, p. 778) Bonds of Irrigation Districts are, after the proceedings therein provided for, made available for investment of trust funds and for the funds of insurance companies and others. That act, as amended, is now known as the "California District Securities Commission Act" and is referred to as Act No. 3857a Deering's General Laws of California, 1931, page 2013.

Pursuant to the foregoing authority Amicus Curiae has purchased and is the owner of bonds of a number of California Irrigation Districts. Among the districts, whose bonds are so held and owned by Amicus Curiae, is Merced Irrigation District, which District is formed and exists under the same law under which the Appellant is formed and exists. Amicus Curiae is the owner of $100,000 principal amount of the bonds of Merced Irrigation District. Merced Irrigation District brought a proceeding under Chapter IX. of the Bankruptcy Act which proceeding was resisted by Amicus Curiae among others. That proceeding was tried in the United States District Court, appealed to the Circuit Court of Appeals for the Ninth Circuit, and the proceeding was dismissed following the decision of this Court in the *Ashton* case. Certiorari was denied by this Court October 17, 1937.

At a session of the Legislature of California in 1937, an act was passed known as the Irrigation District Refinancing Act. Merced Irrigation District has commenced and has pending in the Superior Court of the State of California, in and for the County of Merced, an action endeavoring to accomplish a similar purpose under this new act of the State. Amicus Curiae has appeared in and is resisting that action.

Amicus Curiae is also the owner of $45,000 principal amount of the bonds of South San Joaquin Irrigation District, which District is formed and exists under the same act under which the Appellant is formed and exists. South San Joaquin Irrigation District also attempted to avail itself of the provisions of Chapter IX. of the Bankruptcy Act and now has pending in the Superior Court of the State of California, in and for the County of San Joaquin an action under the Irrigation District Refinancing Act, above referred to, in which action Amicus Curiae is appearing in opposition to the claims of the District.

It is thought likely that the bonds of the several irrigation districts in California and other western states, owned and held by Amicus Curiae, will be greatly affected by the decision of the Court in this case.

SUMMARY OF ARGUMENT.

Point A:

Chapter IX. of the Bankruptcy Act, held by this Court to be unconstitutional, is not dissimilar, so far

as its constitutional sufficiency is concerned, from Chapter X. now before the Court in this case.

Point B:

Among the many important questions involved on this appeal aside from the similarity between Chapter IX. and Chapter X. of the Bankruptcy Act, we desire to address ourselves to what we conceive to be the one controlling question, and that is: Has Congress the power under the constitution to fasten upon an irrigation district in California a bankruptcy measure of any kind.

In arriving at the correct answer to that question we submit:

(1) That the powers of Government are divided between the several states and the United States. That the powers delegated to the United States are sufficient in themselves and may be exercised by the United States without any control or hindrance by the States and on the other hand the powers reserved to the states may not be interfered with by the United States.

(2) If the bankruptcy power includes the state and state agencies, then that power may be exercised without the consent or even over the protest of the state.

(3) The bankruptcy clause, like the taxing clause, is couched in general language and since the exercise of the bankruptcy power over the state and the state agencies would tend to destroy the independence of the state, it will not be supposed that the framers of

the constitution intended by the use of the general language used to confer that power upon the United States any more than it has been supposed that the framers of the constitution intended either the state or the United States to tax the other.

(4) Since the United States has no power to tax the state and its agencies, it likewise, by the same reasoning, has no power to apply a bankruptcy measure to the state or its agencies.

(5) From the history of the constitution and laws as they existed at the time the constitution was adopted and from the nature of the case it is apparent that the bankruptcy clause was not intended to apply to the state or its agencies.

(6) That the application of the bankruptcy power to the state and its agencies would amount to a weapon of destruction and if the power to create such weapon exists, whether the power is used or not, the state and its agencies would necessarily suffer under the ever present threat.

(7) The irrigation district in California is a governmental agent of the state. That being so, if a bankruptcy measure can be applied to the irrigation district it can likewise be applied to the state itself.

ARGUMENT.

POINT A.

THIS ACT IS NOT MATERIALLY DIFFERENT FROM THE ONE ALREADY HELD TO BE UNCONSTITUTIONAL.

There seems to be but one, if any, substantial difference, so far as the character and purpose of the acts are concerned, between Chapter X. now before the Court, and Chapter IX. heretofore declared to be unconstitutional in *Ashton v. Cameron County Water Improvement District No. 1*, 298 U. S. 513.

By subdivision (b) of Section 80 (Tit. 11, Sec. 303 U.S.C.A.) (held to be unconstitutional) it is provided:

> "A plan of readjustment within the meaning of this chapter (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; and (2) may contain such other provisions and agreements, not inconsistent with this chapter, as the parties may desire."

By Section 83 (Tit. 11, Sec. 403, U.S.C.A) (now before the Court) it provided:

> "The 'plan of composition,' within the meaning of this chapter, may include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either to issuance of new securities of any character, or otherwise, and may contain such other provisions and agreements not inconsistent with this chapter as the parties may desire."

Originally the thing to be done was called a "readjustment". Now the same thing is to be done, but it

is called "composition". It seems to be supposed that there is some merit in these particular labels, even though they use different words for exactly the same thing.

We are persuaded that this Court is more interested in what is to be done under the Act or what may be done under the Act than it is in what the Act or the several steps under it may be called.

If this Act provides for a "composition" and not an "adjustment", then the former Act provides for a "composition" and not an "adjustment", and, after all, it is quite immaterial whether it is called "composition" or is called "adjustment" or called by any other name. It originates, exists and has its being, if at all, under the bankruptcy clause of the constitution and not elsewhere.

POINT B.

CHAPTER X OF THE BANKRUPTCY ACT IS NOT AUTHORIZED BY THE CONSTITUTION.

It is respectfully suggested that the United States, through the Congress, does not have power under Clause 4, Section 8, Article I. of the Constitution to enact any bankruptcy measure that will apply to a state or any of the governmental agencies of a state. The whole of the bankruptcy power is found in this clause of the Constitution. If the power is not conferred by this clause of the Constitution, then the power does not exist.

(1) DIVISION OF POWERS BETWEEN UNITED STATES AND THE STATES.

It is well established that the United States is a government of delegated powers. Within the powers delegated by the Constitution the United States is sovereign and supreme, and those powers may be exercised by the United States upon the states and the people of the United States free and unhindered. As to all power not thus delegated or reserved to the people, the state is equally supreme—the state is sovereign. The state within its field—that is, within the field of powers not delegated by, or prohibited to it, by the Constitution—is as complete and independent of the United States as if it were a foreign and independent power.

In *United States v. Butler,* 297 U. S. 1, 63, this Court, by Mr Justice Roberts, stated the rule as follows:

> "* * * It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments,—the state and the United States. Each state has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. * * *"

Also:

> (68) "From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted,

> or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. * * * "

In *White v. Hart,* 13 Wall. 646, 650, this Court said:

> "* * * The government of the nation and the government of the states are each alike absolute and independent of each other in their respective spheres of action; * * * "

See, also:

Brush v. Commissioner, 300 U. S. 352, 364;
South Carolina v. United States, 199 U. S. 437, 452;
Lane County v. Oregon, 7 Wall. 71, 76.

(2) WHERE A POWER HAS BEEN DELEGATED TO THE UNITED STATES THE UNITED STATES IS SUPREME.

Where power is delegated to the United States by the Constitution, that power may be exercised by the United States as that government may determine.

This principle was laid down early in the history of the country by Mr. Chief Justice Marshall in the case of *M'Culloch v. Maryland,* 4 Wheat. 315, 424, where he said:

> "No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the ac-

> complishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments which might disappoint its most important designs, and is incompatible with the language of the constitution. * * * "

See, also:

In the Matter of Quarles, 158 U. S. 532, 535.

We thus see that if Congress is empowered by the Bankruptcy Clause to extend a law on the subject of bankruptcies so as to include a state or its agencies, then it may do so in such way as Congress alone may determine. If Congress may authorize a voluntary bankruptcy proceeding by the governmental agent of a state it may likewise authorize an involuntary bankruptcy proceeding against the governmental agent of the state and without the consent or even over the protest of the state. If it may apply such a measure, voluntary or involuntary, by or against the governmental agent of the state, it may apply such a measure to the state itself. It is wholly a question of power.

(3) THE BANKRUPTCY CLAUSE, LIKE THE TAXING CLAUSE IS COUCHED IN GENERAL LANGUAGE.

It will be observed that the Bankruptcy Clause is stated in general language.

It is a familiar rule of construction that general statutory language does not apply to the sovereign to his disadvantage.

In *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 155, the Court reviewed authorities and said:

> "The decision was expressly put upon the ground 'that the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign.' There was much reasoning to sustain the proposition, and it was especially applied to discharges in bankruptcy. Expressing the general assent to the proposition announced, the Court said:
>
> "'Greater unanimity of decision in the courts or of views among text writers can hardly be found upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts, Federal or State, nor among the text writers of this country.'"

See, also:

United States v. Thompson, 98 U. S. 486, 489;
Marshall v. New York, 254 U. S. 380, 382.

This rule was recognized in the Colonies and passed on from the Colonies to the new states. The sovereignty being reserved to the state, each of the states possesses the prerogatives of a sovereign, one of which is that the sovereign is not bound by general language which works to his disadvantage. Since a bankruptcy law which would subject the fiscal affairs of the state to an involuntary proceeding would not only be to the disadvantage of the sovereign state, but could actually destroy the independence of the state,

it seems impossible to conceive that the states, or the people in their sovereign capacity, intended, by the general language of the Bankruptcy Clause, that the independence of the state should thus be put in jeopardy.

(4) UNITED STATES HAS NO POWER TO TAX THE STATE.

In *Buffington v. Day*, 11 Wall. 113, 126, it is said:

> "The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the states?
>
> "We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the state, disables the general government from levying the tax, as that depends upon the express power 'to lay and collect taxes,' but it shows that it is an original inherent power never parted with, and, in respect to which, the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the

right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in Dobbins v. The Commissioner of Erie, from taxation by the state; for, in this respect, that is, in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

See:

Rose's Notes, this case.

The *Buffington* case is a leading authority upon the subject of the right of the United States to tax an agency or instrumentality of the state, and it is interesting to note that this Court uses the strong language used in the *Buffington* decision regarding the right of the United States to tax an officer of the state notwithstanding the constitutional provision: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises * * * " (Art. I, Sec. 8, Cl. 1.) This language is by its terms unlimited. The language, however, is general. The state in the exercise of its reserved powers is sovereign. To tax the state would be to its disadvantage. The exemption is necessarily implied.

(5) BANKRUPTCY CLAUSE WAS NOT INTENDED TO APPLY TO A STATE.

What the people meant by the general language used in the Bankruptcy Clause can best be determined by putting ourselves as nearly as possible in the position they occupied at the time the Constitution was approved; in other words, by an understanding of the state of the law as it then existed.

This Court stated in the case of *Continental Ill. Nat. Bk. & Trust Co. v. Chicago-Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 668:

> "The English law of bankruptcy, as it existed at the time of the adoption of the Constitution, was conceived wholly in the interest of the creditor and proceeded upon the assumption that the debtor was necessarily to be dealt with as an offender. Anything in the nature of voluntary bankruptcy was unknown to that system. Per-

> sons who were permitted to fall within the term 'bankrupt' were limited to traders. * * * "

The Court then proceeds to point out that the framers of the Constitution did not intend to limit the Congress to the then existing English law and practice upon the subject, and we quote from that decision for its historical value and to show that bankruptcy as then understood was involuntary in nature and the scope of persons who might come within its terms was limited.

In *South Carolina v. United States,* 199 U. S. 437, 450, the Court said:

> " 'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627; Ex parte Wilson, 114 U. S. 417, 422, L. ed. 89, 91, 5 Sup. Ct. Rep. 935; Boyd v. United States, 116 U. S. 616, 624, 635, 29 L. ed. 746, 748; 6 Sup. Ct. Rep. 524; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508; 8 Sup. Ct. Rep. 564. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Com. 336; Bradley, J., in Moore v. United States, 91 U. S. 270, 274, 23 L. ed. 346, 347.'
>
> "To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants."

In *Marshall v. Gordon,* 243 U. S. 521, 533, this Court, by Mr. Chief Justice White, said:

> "Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. * * *"

As we have seen, the common law recognized the prerogative of the sovereign and that the sovereign was not bound by general language of a statute which worked to his disadvantage. This was well understood at the time the Constitution was adopted and was a principle that had been in use from time immemorial.

For a historical discussion of the various bankruptcy statutes, see *Hanover Nat. Bk. v Moyses,* 186 U. S. 181, 184, also the late case of *Continental Illinois Nat. Bk. & Trust Co. v. Chicago-Rock Island & Pacific Ry. Co.,* supra.

Suffice it to say in this regard that we have no record that prior to the adoption of the Constitution any bankruptcy statute in any country had ever applied to the sovereign, and since the adoption of the Constitution, until Congress enacted Chapter IX. no attempt, so far as we are aware, has ever been made by Congress to apply a bankruptcy statute to a state or any of its agencies or instrumentalities.

(6) APPLICATION OF THE BANKRUPTCY POWER TO STATE AGENCIES MIGHT DESTROY THEM.

It would hardly seem that the framers of the Constitution intended to place in the hands of these districts or other public agencies a weapon that might be used by them or their leaders to destroy the agencies themselves. If the power exists in Congress to fasten upon these public agencies a bankruptcy measure of any kind then the weapon of destruction would

seem to be in their hands or in the hands of Congress, and whether it be used or not, by them or by Congress, the elements of destruction are ever present. These public agencies that construct and operate extensive works must, from time to time, have credit and borrow money. If the means is placed in their hands or is available to them or might become available to or against them, by act of Congress, by which the creditor is or may be left without protection or means to enforce his contract then the credit of the district would seem to be nearly if not quite gone.

The Court is, of course, concerned only with the question as to whether or not the act squares with the Constitution (*United States v. Butler,* 297 U. S. 1, 62, 63), but in resolving that question, the Court will, on occasion, consider what effect the act will or is likely to have (*W. B. Worthen Co. v. Kavanaugh,* 295 U. S. 56, 60; *Shouse v. Quinley,* 3 Cal. (2d) 357, 361; *James v. Dravo Contracting Co.,* 82 L. ed. Adv. Op. 125, 136).

It may be argued that bankruptcy has not destroyed the credit of private agencies. The answer to that argument is clear. Private agencies may pledge or mortgage or otherwise hypothecate their assets, and they have assets which may be pledged, mortgaged or hypothecated. Not so with the public agency. The assets of the public agencies which could be pledged or mortgaged, are not usually permitted to be so pledged or mortgaged. The main asset of the public agency is the taxing power. The taxing power can never be mortgaged. The California irrigation dis-

trict, in particular, is not permitted to pledge, mortgage, or hypothecate property which it may have.

Section 17 of the original Wright Act of California, after providing that the bonds and interest should be paid by revenue derived from an annual assessment and that the real property in the district should be and remain liable to be assessed for such payment (largely the same as Sec. 33 of the present Act). was amended in 1893 to provide that as an additional security for the payment of bonds and interest thereon, the Board of Directors should have power to pledge by mortgage, trust deed, or otherwise, all property of the district. After this amendment, Escondido Irrigation District, organized under the Wright Act, made two issues of bonds aggregating $350,000 and purported to execute a trust deed upon its water system and other property. Upon default, the trustees brought action to foreclose the lien and to sell the property. In the case of *Merchants National Bank of San Diego v. Escondido Irrigation District,* 144 Cal. 329, 333, the Court held the trust deed to be void and the amendment to Section 17 of the Wright Act to be unconstitutional and said:

> "The pledge or hypothecation of the property of the district, in the absence of qualifying expressions, necessarily implies the right of foreclosure and sale in the ordinary way,—that is to say, in such manner as to convey to the purchaser the whole property in the land hypothecated, legal and equitable. (Civ. Code, secs. 2931, 3000.) And this construction is confirmed by the consideration that the conveyance of the mere legal title

would not serve as additional security, as intended by the act; and that to convey, in addition to the legal title, the statutory powers of the board to the possession and management of the water system and other property of the district would be in contravention of section 13 of article XI of the constitution, which forbids the delegation of such powers. Which provision, it can hardly be doubted, must (with section 12 of the same article) be construed as applying equally to public or municipal corporations of this character, as to ordinary municipalities or cities. For not only is this construction required by the reason, and consequently by the presumed intention, of the constitutional provision, but the term *municipal,* as commonly used, is appropriately applied to all corporations exercising governmental functions, either general or special; and, indeed, this must be taken as the definition of a *public* or *municipal corporation.*"

As a further ground for holding the Act unconstitutional and the trust deed void, the Court said:

"The other position of the appellant is equally untenable. The state, indeed, has a large, though not an unlimited, power of disposition over the property of ordinary municipalities; which is commonly held in trust for the public generally, or for the limited public of the municipality. (Cooley on Constitutional Limitations, 342 et seq.; 1 Dillon on Municipal Corporations, secs. 27, 66, 67.) But here, the corporation in question is distinguished from ordinary municipal corporations by the fact that 'the *legal title',* only of the property of the corporation is vested in the district, 'in trust for the uses and purposes set forth

> in (the) act'; and that the beneficiaries of the trust—who, upon familiar equitable principles, are to be regarded as the owners of the property —are the landowners in the district with whose funds the property has been acquired (Civ. Code, sec. 853); and in whom, indeed, is vested by the express provisions of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water-rights, reservoirs, ditches, and property generally, as the means of supplying water."

While the Courts in later cases have held that the equitable title or beneficial interest in the land is vested in the State and not in the property owners, the principle enunciated in the *Escondido* case to the effect that the public property of the District can not be mortgaged has remained unchanged and seems definitely to be the law.

(While the beneficial ownership of the property held by one of these districts has a strong bearing upon the nature of the district, we feel that the point is so well settled that we are hardly justified in setting out those authorities at this point, but for the convenience of the Court, a list of such authorities showing the state to be the beneficial owner is attached to this brief as appendix A.)

Even the unsecured creditor of the private agency is protected to the full extent of the assets of the agency. The unsecured creditor of the private agency may sue and reduce his claim to judgment and execute upon the property of the private agency and, so long

as there is property available, the judgment will be paid. Execution will not lie upon the property of the California irrigation district. If the private agency becomes insolvent then, through a Court of bankruptcy, voluntary or involuntary, its assets are marshalled and the creditors are paid in proportion to such assets. Since the principal asset of the public agency is the taxing power and the other assets are held in trust, there are no assets to be marshalled. Sec. 29 of the California Irrigation District Act reads, in part, as follows:

> "The legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district and shall be held by such district in trust for and is hereby dedicated and set apart to the uses and purposes set forth in this act."
>
> *Deering's General Laws, 1931,* p. 1970, Act. 3854.

It may be assumed that if Congress has the power to enact a bankruptcy statute that will apply to one of these public governmental agencies, Congress will act reasonably and even wisely, but that is not the answer. If Congress has the power, then Congress may exercise the power and so long as it is thought that Congress has that power, the threat is ever present. Whether the power is exercised or not is of little consequence because if the power exists every contract that is made by one of these public agencies is subject to the exercise of that power. In other words, it is subject to an unknown condition. If Congress has the power to enact a voluntary measure, such as this,

it may enact an involuntary one or one of far reaching consequences.

It must be kept in mind that in the Act now before the Court the taxing agency is made independent of the State so far as this bankruptcy statute is concerned. The State agency requires no consent from the State. While we do not regard lack of consent to be at all controlling, the agency may injure its credit by petition under this act, even though State policy might be entirely opposed to such proceeding. It is not difficult to imagine a case where the State credit would be seriously affected by virtue of a considerable number of its agencies coming under this act, and the State credit would seem to be affected by the act, or if the power exists in Congress to pass the act, whether there is any act or any of its agencies take advantage of the act. It can hardly be doubted, furthermore, that if the power exists in Congress to permit one of these agencies to impair the obligations of its contracts through a Court of Bankruptcy it has the same power and could with equal propriety permit the State to do the same thing.

The fact that Congress has not seen fit in this or in its previous attempt, to exercise its full power is not in derogation of the power. The Congress may exercise its full power when it deems such action expedient. No bankruptcy measure prior to the adoption of Chapter IX. seems to have ever been adopted to apply to the sovereign. Since such a measure was wholly unknown at the time of the adoption of the Constitution and since the exercise of such a power by the Congress would seem to be incompatible with

the exercise of the independent reserved powers of the State, and could easily be made to seriously injure the State and its agencies, and since the bankruptcy clause is couched in the most general language, it is doubtful if such extraordinary power in the Congress was ever intended.

The People is the true sovereign. Under our form of government the sovereign has set up two agencies to perform its functions of government. The one is the State, the other is the United States, and the sovereign has assigned to each of its agencies of government those functions which is deemed expedient for that particular agent to perform, and as we have seen, each of these agents, within its field of action delegated or reserved by the People, is independent of the other.

We have seen that under the taxing clause of the Constitution the People did not intend that either of its agents should have the power to destroy or hamper the other of its agents and thus the United States, though not expressly prohibited from doing so, is not permitted by the Constitution to tax the State and its governmental agents, and on the other hand, and by the same rule, the State is not permitted to tax the United States and its governmental agents. Now unless we suppose that the People intended to give to the United States, under the bankruptcy clause, the power to control, hamper and ultimately destroy the State, it would seem that the same rule must apply as has been applied to the taxing clause, namely, that the power to extend a bankruptcy measure to the State has never been given and is thus prohibited.

(7) AN IRRIGATION DISTRICT IN CALIFORNIA IS A PUBLIC CORPORATION PERFORMING A GOVERNMENTAL FUNCTION AND IS THUS A GOVERNMENTAL AGENT OF THE STATE.

> "* * *'In our opinion, it is too late in the day'," said this Court in O'Neill v. Leamer, 239 U. S. 244, 251, speaking through Mr. Justice Hughes, quoting from the opinion of the Supreme Court of Nebraska, " 'to contend that the irrigation of arid lands, the straightening and improvement of water courses, the building of levees and the drainage of swamp and overflowed land for the improvement of the health and comfort of the community, and the reclamation of waste places and the promotion of agriculture, are not all and every one of them subjects of general and public concern, the promotion and regulation of which are among the most important of governmental powers, duties, and functions. * * *' We see no reason at this time to depart from that opinion, and therefore this contention must be considered foreclosed as far as this Court is concerned. * * *"

In *Houck v. Little River Drainage District,* 239 U. S. 254, this Court, also speaking through Mr. Justice Hughes, relating to a drainage district in Missouri, said:

> "It was constituted a political subdivision of the state for the purpose of performing prescribed functions of government * * * These drainage districts, as the Supreme Court of the state has said, exercised the granted powers within their territorial jurisdiction 'as fully, and by the same authority, as the municipal corporations of the state exercised the powers vested by their charter. * * *'"

In *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, this Court said:

> "The formation of one of these irrigation districts amounts to the creation of a public corporation and their officers are public officers."

In *Ashton v. Cameron County Water Improvement District No. 1*, 298 U. S. 513, 527, this Court, speaking through Mr. Justice McReynolds, said:

> "It is plain enough that respondent is a political subdivision of the state, created for the local exercise of her sovereign powers, and that the right to borrow money is essential to its operation. * * * Its fiscal affairs are those of the state, not subject to control or interference by the national government, unless the right so to do is definitely accorded by the federal constitution."

In the dissenting opinion in the *Ashton case*, Mr. Justice Cardozo said:

> "Cameron County Water Improvement District No. One is a public corporation, created by the laws of Texas. * * * "

In the late case of *Brush v. Commissioner*, 300 U. S. 352, 368, this Court, by Mr. Justice Sutherland, said:

> "We recently have held that the bankruptcy statutes could not be extended to municipalities or other political subdivisions of a state. Ashton v. Cameron County Water Improv. Dist., 298 U. S. 513, 80 L. ed. 1309, 56 S. Ct. 892, 31 Am. Bankr. Rep. (N. S.) 96. The respondent there was a water-improvement district organized by law to furnish water for irrigation and domestic uses. We said (pp. 527, 528) that respondent was

a political subdivision of the state 'created for the local exercise of her sovereign powers. * * * Its fiscal affairs are those of the State, not subject to control or interference by the National Government, unless the right so to do is definitely accorded by the Federal Constitution.' In support of that holding, former decisions of this court with respect to the immunity of states and municipalities from federal taxation were relied upon as apposite. The question whether the district exercised governmental or merely corporate functions was distinctly in issue. The petition in bankruptcy alleged that the district was created with power to perform 'the proprietary and/or corporate function of furnishing water for irrigation and domestic uses. * * *' The district judge held that the district was created for the local exercise of state sovereign powers; that it was exercising 'a governmental function'; that its property was public property; that it was not carrying on private business, but public business. That court, having denied the petition for want of jurisdiction, the district submitted a motion for a new trial in which it assigned, among other things, that the court erred in holding that petitioner was created for the purpose of performing governmental functions, 'for the reason that the Courts of Texas, as well as the other Courts of the Nation, have uniformly held that the furnishing of water for irrigation was purely a proprietary function. * * *' Substantially the same thing was repeated in other assignments of error. In the petition for rehearing in this court, the district challenged our determination that respondent was a political subdivision of the state

> 'created for the local exercise of her sovereign powers', and asserted to the contrary that the facts would demonstrate that 'respondent is a corporation organized for essentially proprietary purposes'. It is not open to dispute that the statements quoted from our opinion in the Ashton Case were made after due consideration, and the case itself decided and the rehearing denied in the light of the issue thus definitely presented."

The proposition that an irrigation district is a public corporation exercising governmental functions as an agent of the State seems so thoroughly settled that further discussion is hardly necessary. For the convenience of the Court, however, we have attached to this brief as Appendix B additional authorities on this point.

The act here under consideration seems to apply only to "taxing agencies or instrumentalities". The very term implies a governmental function of the highest order.

As said by this Court in *Merriwether v. Garrett*, 102 U. S. 472, 515:

> "The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the Legislature upon conditions of policy, necessity, and the public welfare."

The Supreme Court of California in the case of *In re Madera Irrigation District*, 92 Cal. 296, 322, speaking of an irrigation district of California, and particularly as to the taxing power, said:

"For the purpose of meeting the cost of acquiring this property, the district is authorized, upon the vote of a majority of its electors, to issue its bonds, and these bonds and the interest thereon are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation,—one of the highest attributes of sovereignty,—the title of the delinquent owner to the real estate assessed may be divested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers, chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public."

See also:

Lane County v. Oregon, 7 Wall. 71, 76.

CONCLUSIONS.

Since it seems clear enough that if Congress under the Constitution has the power to extend a voluntary act on the subject of bankruptcy to a governmental agency of the State it could with equal propriety and acting under the same power extend an involuntary bankruptcy measure to a governmental agency of the State. It also seems clear that if Congress can extend a bankruptcy measure, voluntary or involuntary, to the agency of the State, exercising governmental powers, it could by the same token extend the same act, voluntary or involuntary, to the State itself. Since such a measure applied to the State might seriously embarrass the State in the exercise of its highest duties as a sovereign, it could hardly be supposed that the general language of the bankruptcy clause was intended to grant such power.

If Congress has the power—if the act is constitutional, the Court will not hesitate to enforce it, but in times of great economic stress, in an effort to obtain temporary relief from pressing burdens or obligations, we are sometimes prone to overreach with little regard for ultimate consequences or later embarrassment to ourselves and future generations. One of the great purposes of the Constitution is to guard against just that. It is a chart to guide us in fair weather but more particularly during the storm when the way does not seem so clear. If we depart from it in the storm, the way may be lost. As said by Mr. Chief Justice Taft, speaking for the Court in *Bailey v. Drexel Furniture Company*, 259 U. S. 20, 37:

"The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards."

Dated, San Francisco, California,
March 28, 1938.

Respectfully submitted,
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CHARLES L. CHILDERS,
Of Counsel.

(Appendices A and B Follow.)

Index to Appendix

Appendix A

As holding that the beneficial interest in the property of these public agencies is in the State.

In *Reclamation Dist. v. Birks,* 159 Cal. 233, 238, the Court stated:

> "In the recent case of Pass School District v. Hollywood, 156 Cal. 416, (26 L. R. A. (N. S.) 485, 105 Pac. 122), this court was called upon to determine the ownership of the property of a school district, which by the legal annexation of certain land had passed into another school district. It was contended that the property having been paid for by the inhabitants of the school district in which it was originally situated, title to it still remained in the original district, with the right in that district of leasing or selling it. But by this court it was pointed out that school districts are like reclamation districts, quasi municipal corporations, and that, subject to such constitutional limitations as may exist, the power of the legislature over them is plenary; that the legislature may divide, change or abolish them at pleasure; that the beneficial title to all the property owned by the district is in the state and that when, by the change of boundaries this property falls within a new district, the beneficial title still remains in the state and, in legal contemplation, the state has merely placed the legal title in the hands of other trustees to manage it. It is said: 'The legislative power being full and complete over the matter, as a part of that power it may make provision for the division of the property and the apportionment of the debts of the old corporations when a portion of its territory and public property are trans-

ferred to the jurisdiction of another corporation, but in the absence of such provision the rule of the common law obtains, and that rule leaves the property where it is found and the debt upon the original debtor.' The principle and the rule are the same in the case at bar * * *."

In *Reclamation Dist. v. Superior Court,* 171 Cal. 672, 680, the Court said:

"All of these rulings are founded upon the proposition that the county (or reclamation or school district) is a mere political agency of the state, that it holds its property on behalf of the state for government purposes, and that it has no private proprietary interest in such property as against the state * * *

"These views are in no wise inconsistent with the recognition of a sufficient title in the counties to justify their maintaining actions against private persons or corporations injuring roads or other public property. That such actions may be maintained is the full extent of the holding in cases like Sierra County v. Butler, 136 Cal. 547 (69 Pac. 418), and Yuba County v. Kate Hayes Min. Co., 141 Cal. 360 (74 Pac. 1049), cited by respondents * * *."

In *Turlock Irr. Dist. v. White,* 186 Cal. 183, 189, the Court said:

"It should be stated that it is conceded that irrigation districts were not taxable before the amendment of 1914, and are not now, unless such taxation is authorized by the amendment, but it is contended that they then were exempt because of the special exemption of the property of 'municipal corporations' contained in such section, and

> that such irrigation districts are now taxable under the special exception in the amendment authorizing the taxation of 'municipal corporations'. To the contrary, such exemption existed because of the express exemption of the property of *'the state'*, contained in that section and because of the implications in favor of exemption of public property * * *
>
> "The language quoted in the dissenting opinion from Southern Pacific Co. v. Levee Dist. No. 1, 172 Cal. 345 (156 Pac. 502), read in the light of the express statement in the opinion that such districts are not 'municipal corporations', would indicate that the court considered that the property of the district was 'state property' rather than property of a 'municipal corporation'.

In *Reclamation Dist. No. 551 v. County of Sacramento,* 134 Cal. 477, 479, the Court was considering the question of the taxability of property held by reclamation districts, and said:

> "It would be sufficient to hold that it is public property of the state, within the meaning of the constitution. The whole scheme of reclamation originates with the state, and is carried to a conclusion by agents of the state—the districts, as we have already seen, being a public agency,—in furtherance of public policy. The property mentioned in section 3471 of the Political Code is public property, acquired by the agents of the state, for state purposes, and we think is exempt from taxation, as such."

In *People v. Richards,* 86 Cal. App. 86, 93, the Court was considering a case involving the Los Angeles County Flood Control District, and after holding that

that district is similar to irrigation and reclamation districts (p. 91), and citing the case of *Turlock Irr. Dist. v. White,* supra, said:

> "The plain conclusion from these authorities is that the quasi corporations under consideration, including irrigation districts, reclamation districts, and school districts, are all merely state agencies for carrying out state purposes and their property is state property."

In *Pass School District v. Hollywood City School Dist.,* 156 Cal. 416, 418, the Court was considering the property of a school district, and said:

> "Subject to such constitutional limitations as may exist, the power of the legislature over these public municipal corporations is plenary. It may divide, change, or abolish them at pleasure."

A quotation similar to this has been applied to irrigation districts in many cases. Then the Court continues (p. 419):

> "* * * it should be sufficient to point out that in all such cases the beneficial owner of the fee is in the state itself, and that its agencies and mandatories—the various public and municipal corporations in whom the title rests—are essentially nothing but trustees of the state, holding the property and devoting it to the uses which the state itself directs."

In *City of Sacramento v. Adams,* 171 Cal. 458, 462, the Court said:

> "* * * It is to be borne in mind that the state itself has absolute control of all the property of such of its agencies as cities, towns, counties—is, in a sense, the ultimate owner thereof."

In *Drainage Dist. v. Reclamation Dist. No. 730,* 1 Cal. (2d) 350, 352, the Court said:

> "The whole scheme of reclamation originates with the state and is carried to a conclusion by agencies of the state—the districts—in furtherance of public policy, and the property of such districts acquired thereby which is indispensable to the execution of its objects is public property of the state. * * *"

Appendix B

The following authorities indicate the governmental nature of irrigation districts and similar public agencies in California:

(1) Governmental.

In *Dean v. Davis,* 51 Cal. 406, 410, 411, the Court said:

> "It is true, perhaps, that it was not formed or organized 'for the government of a portion of the state', in the broadest sense of the term. But it nevertheless exercises certain governmental functions within the district. * * * To constitute a public corporation it is not essential that it shall exercise *all* the functions of government within the prescribed district. School districts and road districts may be, and often are, public corporations, 'invested with a corporate character, the better to perform within, and for the locality, its special function, which is indicated by its name. It is but an instrumentality of the State, and the State incorporates it that it may more effectually discharge its appointed duty.' "

In *Miller & Lux v. Board of Supervisors,* 189 Cal. 254, 263, the Court said:

> "* * * In the opinion in the Madera District case the irrigation district was treated as a public corporation to be invested with certain political duties to be exercised in behalf of the state."

In *People v. Cardiff Irr. Dist.,* 51 Cal. App. 307, 312 (hearing by Supreme Court denied), after holding

such a district is a municipal corporation, the
said:

* * * nevertheless the affairs, concerning which
ich district does act are those of a public cor-
oration to be invested with certain political duties
hich, it is to exercise in behalf of the state."

Bolton v. Terra Bella Irr. Dist., 106 Cal. App.
16 (hearing by Supreme Court denied), the Court
:

The county is an agency of the state for per-
orming certain functions of government. The
egislature has likewise provided for, and author-
ed, irrigation districts to carry out another func-
on of government. * * *"

Woody v. Security Trust & Savings Bank, 137
App. 29, 35 (hearing by Supreme Court denied),
ourt said:

* * * An irrigation district possesses govern-
ental functions and is a creature of law which
an only be brought into being under the direct
uthority of the state."

Yolo v. Modesto Irr. Dist., 216 Cal. 274, 277, the
said:

* * * it was within the classification of a public
r state agency performing a governmental func-
on, * * *"

People v. San Joaquin Valley Agricultural Assn.,
al. 797, 799, 805, the Court was considering a
of organizations not greatly different in their
al structure from an irrigation district, and said:

"* * * A consideration of the provisions of that act * * * clearly shows that the association is a public corporation engaged in carrying on one of the objects committed to the state government by the constitution * * *

"All these considerations conclusively demonstrate that these associations are public agencies of the state, within its exclusive management and control, and charged with the performance of a part of the functions of the state government * * *"

In support of this proposition the Court cites a great number of authorities, most of which relate to irrigation and reclamation districts.

In *Swampland etc. Dist. No. 341 v. Blumenberg,* 156 Cal. 532, 537, the Court said:

"* * * A levy for such purposes by a district which has completed its permanent system of ditches, a district which, though not a municipal corporation, is at least a public corporation performing some of the functions of government for the local territory interested, bears a close resemblance to ordinary taxes levied to defray the expenses of a city or county * * *"

In *Miller & Lux v. Board of Supervisors,* 189 Cal. 254, 263, the Court said:

"* * * In the opinion in the Madera District case the irrigation district was treated as a public corporation to be invested with certain political duties to be exercised in behalf of the state * * *"

(2) As holding districts of this nature to be public corporations.

From 1874 to 1931, Section 284 of the Civil Code of California, provided in part as follows:

> "Public corporations are formed or organized for the government of a portion of the State."

This language was noted in the case of *Dean v. Davis,* supra, decided in 1876. In that case the Court said (p. 410):

> "It is equally clear that, tested by the definitions already given, it is a *public* and not a private corporation."

The Court in the *Dean* case was considering a reclamation district which has been held many times to be similar in character to an irrigation district.

In *People v. Williams,* 56 Cal. 647, it is stated:

> "It must be considered as settled in this state * * * that a reclamation district is a public corporation."

In *Central Irr. Dist. v. De Lappe,* 79 Cal. 351, 353, the Court said:

> "It is settled that reclamation districts are public corporations."

In *Crall v. Poso Irr. Dist.,* 87 Cal. 140, 145, the Court stated:

> "There can no longer be any question that the Wright Act is constitutional, and that irrigation districts organized under its provisions, like reclamation districts, are public corporations."

In *In re Madera Irr. Dist.,* 92 Cal. 296, 321, the Court said:

"That an irrigation district organized under the act in question becomes a public corporation is evident from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it * * * "* * * (p. 322) Here are found the essential elements of a public corporation, none of which pertain to a private corporation * * * (p. 323) 'Where a corporation is composed exclusively of officers of the government, having no personal interest in it, or with its concerns, and only acting as organs of the state in effecting a great public improvement, it is a public corporation.' (Angell & Ames on Corporations, sec. 32.) * * * 'Public corporations are such as are created for the discharge of public duties in the administration of civil government.' (Lawson's Rights and Remedies, sec. 332.)"

In *People v. Turnbull,* 93 Cal. 630, 632, it is said:

"An irrigation district organized under the Wright Act is a public corporation."

In *People v. Selma Irr. Dist.,* 98 Cal. 206, 208, the Court said:

"The defendant is a public corporation, organized under a general law of the state enacted by the legislature for the purpose of promoting the general welfare * * *"

In *Reclamation Dist. No. 124 v. Gray,* 95 Cal. 601, 605, the Court stated:

"The district certainly was a public corporation from the date of the legislative act * * *"

In the case of *Quint v. Hoffman,* 103 Cal. 506, 507, the Court said:

> "* * * An irrigation district of this character is a public corporation, formed under a general law, and its object is the promotion of the general welfare."

In *Metcalfe v. Merritt,* 14 Cal. App. 244, 246, the Court said:

> "Reclamation districts belong to that class of civil organizations denominated 'public corporations'."

In *Whiteman v. Anderson-Cottonwood Irr. Dist.,* 60 Cal. App. 234, 237, it is said:

> "As to the character of irrigation districts as organized under the statute, it must be conceded that they are public corporations or public agencies * * *"

In *Bottoms v. Madera Irr. Dist.,* 74 Cal. App. 681, 694 (hearing by Supreme Court denied), the Court said:

> "In considering these questions we think the following propositions are so firmly established that citation of authority is unnecessary, to wit: That irrigation districts are public corporations or agencies * * *"

In *Jackson & Perkins Co. v. Byron-Bethany Irr. Dist.,* 136 Cal. App. 375, 381 (hearing by Supreme Court denied), it is stated:

> "It is conceded by both sides that the defendant district is a public corporation and as such an agency of the state."

In *Jennison v. Redfield,* 149 Cal. 500, 501, the Court said:

> "Walnut Irrigation District is a public corporation organized under what is known as the Wright Act (Stats. 1887, p. 29) and the acts supplementary thereto."

In *Morrison v. Smith Brothers,* 211 Cal. 36, 40, the Court was considering a municipal utility district and said:

> "The other type of public corporation upon whose tort liability this court has already passed is typified by irrigation, reclamation or drainage organizations, whose main purpose is to assist the state in reclaiming, improving and aiding the productivity of farm land."

In *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.,* 3 Cal. (2d) 489, 504, the Court said:

> "* * * It is a public corporation, organized in 1915, under the Irrigation District Act of 1897, and amendments thereto. (Stats. of 1897, p. 254.) * * *"